

TERESA S. TITUS, also known as TRACY TITUS,
Plaintiff,
v.
WELLS FARGO BANK, N.A.; WELLS FARGO HOME MORTGAGE; FEDERAL NATIONAL MORTGAGE ASSOCIATION aka FANNIE MAE; NORTHWEST TRUSTEE SERVICES, INC.; RCO LEGAL, P.S.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (“MERS”),
Defendants.

THIS MATTER comes before the Court on an Amended Fed. R. Civ. P. 12(b)(6) Motion to Dismiss filed by Defendant Northwest Trustee Services, Inc. (Dkt. 28). The Court has considered Plaintiff's Response (Dkt. 30), Northwest Trustee's Reply (Dkt. 32), and the remainder of the file herein. Because the motion amends Northwest Trustee's prior Motion to Dismiss for Failure to State a Claim (Dkt. 11), the prior motion should be stricken.

In the Second Amended Complaint (“Complaint”), Plaintiff alleges that SunTrust Mortgage, not Wells Fargo, NA or Wells Fargo Home Mortgage (collectively, “Wells Fargo”), is the ‘actual owner’ of a Deed of Trust and related Promissory Note. According to the Complaint, Plaintiff signed a Deed of Trust securing a Promissory Note to pay Sun Trust Mortgage on April

1 5, 2007, and Plaintiff received a notice to direct mortgage payments to Wells Fargo in December
2 2007. Complaint, at ¶¶7, 9. An Assignment of the Deed of Trust in favor of Wells Fargo was
3 recorded on October 8, 2013. Wells Fargo also executed a beneficiary declaration stating that
4 Wells Fargo is the holder of the Promissory Note. *Id.*, at ¶¶11, 32, 38
5

6 After Plaintiff defaulted on payments to Wells Fargo, she received a letter of default in
7 September 2013 from Wells Fargo and a Notice of Default by Northwest Trustee on February 9,
8 2014. Complaint, at ¶16. Northwest Trustee, the named Trustee on the Deed of Trust according
9 to Wells Fargo, pursued nonjudicial foreclosure proceedings against Plaintiff on February 9,
10 2014, issuing a Notice of Default and Notice of Trustee Sale. *Id.*, at ¶17.

11 During a foreclosure mediation, an attorney from RCO Legal, P.S., said with reference to
12 Plaintiff, “We have a problem. We don’t have the note.” Wells Fargo’s underwriter responded
13 with, “What do you mean you don’t have the note? That’s a problem[.]” but the attorney from
14 RCO Legal, who “represents themselves and [Northwest Trustee],” stated to the mediator that
15 “It’s nothing.” *Id.*, at ¶¶24, 25, 38. RCO Legal has also represented Northwest Trustee. *Id.*,
16 ¶¶24, 25.
17

18 As against Northwest Trustee, Plaintiff alleges the following claims: violations of Fair
19 Debt and Consumer Practices Act, the “Federal Consumer Protection Act,” the Washington Deed
20 of Trust Act, and the Washington Consumer Protection Act; misrepresentation by omission; and
21 breach of Northwest Trustee’s covenant of good faith and fair dealing. *See* Dkt. 27, at 21, 22.
22

23 STANDARD FOR MOTION TO DISMISS

24 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable
25 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
26 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken

as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(*internal citations omitted*). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim for relief that is plausible on its face.” *Id.* at 1974.

DISCUSSION

1. Claim 1: Violation of the Federal Fair Debt and Collection Practices Act (FDCPA)

The purpose of the FDCPA is to “eliminate abusive debt collection practices by debt collectors[.]” 15 U.S.C. § 1692(e). In general, a “debt collector” is:

any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects . . . debts owed . . . or due another. . . [T]he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. § 1692a.

However, as this Court and other courts have found, nonjudicial foreclosure actions do not constitute “debt collection,” unless alleged under § 1692f(6). *Greer v. Green Tree Servicing, LLC*, No. 3:14-CV-05594-RJB, 2015 WL 4077432, at *2 (W.D. Wash. July 6, 2015); *Jara v. Aurora Loan Servs., LLC*, No. C 11–00419 LB, 2011 WL 6217308, at *4 (N.D.Cal. Dec.14, 2011); *Garfinkle v. JPMorgan Chase Bank*, No. C 11–01636 CW, 2011 WL 3157157, *3 (N.D.Cal.2011); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp.2d 1188 (D.Or.2002); *Walker v. Quality Loan Serv. Corp.*, 176 Wash.App. 294, 316, 308 P.3d 716 (Div.I, 2013); *Dietz v. Quality*

1 *Loan Serv. Corp. of Washington*, No. C13–5948 RJB, 2014 WL 5343774, at *2
2 (W.D.Wash.2014).

3 Plaintiff alleges that Northwest Trustee attempted to collect on a debt and assisted with
4 the nonjudicial foreclosure. Complaint, at ¶30. This conduct falls squarely within the general
5 definition of “debt collector” as well as the exception pertaining to nonjudicial foreclosure,
6 which would preclude recovery under the FDCPA. *See* § 1692a and *Greer v. Green Tree*
7 *Servicing*, No. 3:14-CV-05594-RJB, *et al.* However, although debt collecting conduct that relates
8 to nonjudicial foreclosure may fall outside the FDCPA generally, Plaintiff also alleges that the
9 conduct occurred when Wells Fargo, which directed Northwest Trustee to pursue nonjudicial
10 foreclosure on its behalf, had no right to possession of the Promissory Note and Deed of Trust.
11 Complaint, at ¶30. *See* § 1692f(6) and *Armacost v. HSBC Bank USA*, No. 10–CV0274–EJL–
12 LMB, 2011 WL 825151 at *3-6 (D.Idaho Feb.9, 2011). Therefore, Plaintiff alleges a plausible
13 FDCPA claim and survives Northwest Trustee’s motion to dismiss.
14
15

16 Northwest Trustee argues that because Northwest Trustee possesses a beneficiary
17 declaration, which is an “unequivocal declaration of Wells Fargo’s status as Note holder,”
18 Northwest Trustee could rely on that information to execute nonjudicial foreclosure. Dkt. 28, at
19 6. However, the circumstances surrounding that beneficiary declaration, which Plaintiff alleges is
20 invalid, present precisely the kind of factual issue that cannot be resolved at the pleadings stage
21 of litigation. Northwest Trustee’s motion to dismiss as to this claim should be denied.
22

23 2. Claim 2: Violation of the Federal Consumer Protection Act

24 Plaintiff alleges that Northwest Trustee is in violation of the “Federal Consumer
25 Protection Act,” which according to Northwest Trustee is a statutory scheme that does not exist.
26 Dkt. 28, at 6. *See* Complaint, at ¶¶33-41. In Plaintiff’s Response, Plaintiff avers that the act

1 alleged is also known as the Consumer Credit Protection, found in Chapter 41 of 15 U.S.C.,
2 which “starts with subsection 1601 and concludes with Section 1692.” Dkt. 30, at 4. In response
3 to Northwest Trustee’s argument that the claim is duplicative of Claim 1, the FDCPA claim,
4 Plaintiff argues that the claim states “other allegations concerning the overall scheme of 15 USC
5 Chapter 41.” *Id.*
6

7 This claim lacks sufficient specificity as to which section or subsection should apply, so
8 the claim fails because of its vagueness. Chapter 41 of Title 15 of the United States Code
9 includes is an immense and diverse statutory scheme, so to state that an allegation “concern[s]
10 the overall scheme” is insufficient. To the extent that Plaintiff would rely on § 1692, *see*
11 Complaint, at ¶41, the only section specifically referenced in the Complaint, the claim is
12 duplicative of Claim 1. *See id.*, at ¶¶29-32. Plaintiff therefore fails to state a claim. Northwest
13 Trustee’s motion should be granted as to this claim.
14

15 3. Claim 4: Violation of Washington Deed of Trust Act

16 Plaintiff alleges that Northwest Trustee breached its duty of good faith to Plaintiff, which
17 violates the Washington Deed of Trust Act, by “work[ing] in concert with [RCO Legal] to the
18 detriment of [Plaintiff].” Complaint, at ¶47. According to Northwest Trustee, this claim fails
19 because there can be no DTA-based liability without a completed trustee’s sale. Dkt. 28, at 7,
20 citing *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412 (2014). Plaintiff argues in her
21 Response that *Frias* applies only to claims for damages and not other types of relief, and that
22 Plaintiff’s DTA claim “make[s] it abundantly clear that Plaintiff’s efforts are to stop the
23 foreclosure sale” and not to seek damages. Dkt. 30, at 5.
24

25 To begin with, it is not ‘abundantly clear’ that Plaintiff seeks only injunctive relief, not
26 damages. *See* Complaint, at ¶¶46-50 and Dkt. 27, at 21, 22. The better reading of the Complaint

1 supports an inference that Plaintiff does seek damages, for example, when Plaintiff states that
 2 Northwest Trustee violated its obligation of good faith “to the detriment of [Plaintiff]” and that
 3 Northwest Trustee assisted Wells Fargo with collecting funds. *Id.*, ¶¶47, 48. *C.f.* Dkt. 27, at 21,
 4 22.

5
 6 However, even assuming that Plaintiff does not seek damages but rather requests
 7 injunctive relief to prevent a foreclosure, Plaintiff’s interpretation of *Frias* is too narrow.
 8 Although the question certified to the Washington State Supreme Court asked about damages
 9 and not causes of action more generally, *Frias*, at 420, an interpretation of *Frias* that would
 10 allow parties to first seek injunctive relief by complaint without adherence to the statutorily–
 11 prescribed procedure under RCW 61.24.130 would undermine the basic intent of that statute. *See*
 12 RCW 61.24.130 and *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137 (2007)(“The sole method to
 13 contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in
 14 accordance with RCW 61.24.130”). Especially where, as here, Plaintiff does not allege that she
 15 has already sought injunctive relief under RCW 61.24.130 and is now without recourse,
 16 Plaintiff’s interpretation of *Frias* should be rejected. Furthermore, broader language throughout
 17 *Frias* hints that the holding may not just be limited to damages. *E.g.*, *Frias*, at 428 (“under the
 18 current statutory framework, there is no independent cause of action under the DTA for DTA
 19 violations absent a completed foreclosure sale”). Plaintiff has failed to state a claim for relief
 20 under the DTA. Northwest Trustee’s motion should be granted as to this claim.

21
 22
 23 4. Claim 5: Violation of Washington Consumer Protection Act

24 Where, as here, Plaintiffs do not allege a per se violation of the CPA, Plaintiffs alleging a
 25 violation of the CPA must allege (1) an unfair or deceptive practice, (2) occurring in trade or
 26 commerce, (3) that affects the public interest and (4) injures the plaintiff’s business or property

1 and (5) was caused by Defendant. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105
 2 Wn.2d 778, 784 (1986).

3 Plaintiff fails to state a claim under the CPA against Northwest Trustee for at least two
 4 reasons. First, the claim fails because the Complaint fails to allege anything with any specificity
 5 as to Northwest Trustee. Plaintiff alleges only three paragraphs specific to her CPA claim, and
 6 two of them are only directed at Wells Fargo. *See* Complaint, at ¶52 (“Defendant Wells Fargo is
 7 in violation of the [CPA] in that they instruct, or allow their employees to rendered [sic]
 8 deceptive and misleading directions . . .”) and ¶53 (“...deceptive act . . . performed by
 9 employees of Wells Fargo occurs in the Wells Fargo trade or commerce.”). The remaining
 10 allegation does not mention Northwest Trustee, first referring to an unspecified “Defendant,”
 11 then again referring directly to Wells Fargo’s employees: “the deceptive practice of [an
 12 unspecified] Defendant has severely injured Plaintiff . . . in that she has been unable to perform
 13 at full capacity because her energy and time has been committed to combating the resulting
 14 foreclosure This damage is directly caused by the deceptive statements of Wells Fargo’s
 15 employees.” ¶54. The CPA claim against Northwest Trustee lacks sufficient particularity to
 16 provide Plaintiff with any relief from Northwest Trustee.
 17

18
 19 Second, the CPA claim fails to allege a public interest impact. The only reference
 20 anywhere to the public impact of any defendant is directly related to Wells Fargo, because it is
 21 Wells Fargo that made the “deceptive statements to anyone seeking a modification of their loan.”
 22 ¶53. *See* ¶¶14, 52, 54. Plaintiff fails to state a claim for relief under the CPA. Northwest
 23 Trustee’s motion should be granted as to this claim.
 24

25 5. Claim 7: Misrepresentation Through Omission

26 Although the complaint directly asks for relief for Northwest Trustee’s misrepresentation

1 through omission, Dkt. 27, at 22, Plaintiff concedes in her Response that Northwest Trustee “was
2 not yet [sic] involved in the matters.” Dkt. 30, at 8. The claim should be dismissed. Northwest
3 Trustee’s motion should be granted as to this claim.

4
5 6. Claim 8: Breach of Covenant of Good Faith and Fair Dealing

6 With reference to Northwest Trustee, Plaintiff’s claim alleges in its entirety that
7 “Northwest Trustee and RCO [Legal] made false statements and failed to properly investigate
8 claims that would prevent the foreclosure from taking place.” Complaint, at ¶68. *See id.*, at ¶¶66,
9 67. There is no elaboration as to the content or circumstances of the “false statements” by
10 Northwest Trustee nor is there any allegation of the injury suffered. The preceding paragraphs
11 refer only to a Wells Fargo mediation, adding no context, *see id.*, at ¶¶66, 67, and the request for
12 relief fails to even mention the claim, unlike other claims. *See* Dkt. 27, at 21, 22. Plaintiff fails to
13 state a claim. Northwest Trustee’s motion should be granted as to this claim.

14
15 7. Claim 9: Intentional Infliction of Emotional Distress

16 To establish a claim for intentional infliction of emotional distress, also known as
17 outrage, the plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless
18 infliction of emotional distress, and (3) the plaintiff’s severe emotional distress. *Reid v. Pierce*
19 *Cty.*, 136 Wn. 2d 195, 201 (1998). Whether certain conduct is sufficiently outrageous is
20 ordinarily for the jury, but it “is initially for the court to determine if reasonable minds could
21 differ.” *Dicomes v. State*, 113 Wn.2d 612, 630 (1989). The conduct “must be ‘so outrageous in
22 character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be
23 regarded as atrocious, and utterly intolerable in a civilized community.’” *Grange Ins. Ass’n v.*
24 *Roberts*, 179 Wn.App. 739, 754 (2013).

1 Plaintiff's outrage claim, other than incorporating prior paragraphs, states in its entirety
2 as follows:

3 Defendants' conduct has been egregious and designed to intimidate and harass plaintiff
4 into giving up her home. Their actions are continuing and ongoing. Plaintiff has been in a
5 constant state of turmoil and distress, which has affected her overall health, [sic] because
6 of Defendants' actions. Defendants intentionally or negligently inflicted emotional
distress on Plaintiff. Complaint, at ¶70.

7 Plaintiff alleges nothing more than a formulaic recitation of the elements, and Plaintiff makes no
8 distinction between Northwest Trustee and the other defendants. This is insufficient. A broader
9 consideration of that paragraph in light of the incorporated paragraphs does not make plain what
10 intentional, egregious conduct Plaintiff is attempting to incorporate. *See id.*, at ¶¶1-68.

11 * * *

12
13 THEREFORE, it is hereby ORDERED Defendant Northwest Trustee's Motion to
14 Dismiss (Dkt. 11) is STRICKEN.

15 FURTHERMORE, Defendant Northwest Trustee's Amended Fed. R. Civ. P. 12(b)(6)
16 Motion to Dismiss (Dkt. 28) is GRANTED IN PART as to Claim 2, Claim 4, Claim 5, Claim 7,
17 Claim 8, and Claim 9. Those claims are HEREBY DISMISSED. The motion is otherwise
18 DENIED. As to Defendant Northwest Trustee, Claim 1 may proceed.

19 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
20 to any party appearing *pro se* at said party's last known address.

21 Dated this 22nd day of December, 2015.

22
23 

24 ROBERT J. BRYAN
25 United States District Judge
26